STATE OF MICHIGAN

COURT OF APPEALS

GREAT AMERICAN INSURANCE COMPANY,

Plaintiff/Counter Defendant-Appellant,

v

TAMI JEAN BAIRD, as Next Friend of TIFFANY LYNN McMANAMAN and TARA FREELS, Minors, DEBORAH JEAN STONE, as Next Friend of LINDSEY ANN STONE, a Minor, and COLLEEN BURGE, as Next Friend of ANGELITA LYNN AIELLO, a Minor,

Defendants-Appellees,

and

DOMESTIC ASSAULT/RAPE ELIMINATION SERVICES, CAROL M. ZIELINSKI, and NOREEN PRICE,

Defendants/Counter Plaintiffs-Appellees.

UNPUBLISHED
October 12, 2004

No. 249646
St. Clair Circuit Court
LC No. 01-002777-NO

Before: Cavanagh, P.J., and Fitzgerald and Meter, JJ.

PER CURIAM.

Plaintiff Great American Insurance Company appeals from the trial court order in favor of defendants/counter plaintiffs in this declaratory judgment action. The trial court held that Great American has an obligation to defend and indemnify defendants/counter plaintiffs under the terms of the insurance policy. We affirm.

Great American first argues that the trial court, in making use of the trial brief filed by defendants/counter plaintiffs in drafting its own opinion, violated MCR 2.517(A)(1), which requires proper findings of fact by a court. We disagree. The trial court made extensive and complete factual findings. Great American has not cited to any authority holding that it is improper for a trial court to make use of a party's brief in drafting its opinion. Since the factual

findings made by the court were supported by the record, there is no error entitling Great American to relief.

Second, Great American argues that the alleged conduct by defendants/counter plaintiffs in failing to report suspected child abuse allegedly reported to them would not have been social worker malpractice, and hence was not within the coverage of the policy. Again, we disagree.

We review de novo a trial court's decision that an insurance contract's language is clear and unambiguous, as well as the court's interpretation of that language. *Klapp v United Ins Group Agency, Inc*, 468 Mich 459, 463, 469; 663 NW2d 447 (2003); *Farm Bureau Mut Ins Co v Nikkel*, 460 Mich 558, 563; 596 NW2d 915 (1999).

The trial court found that defendant Domestic Assault/Rape Elimination Services ("DARES") is a social services agency providing services to families in crisis, especially crisis occasioned by domestic abuse. There is no question that providing such services is part of the practice of social work for which the policy provided coverage. There is also no question, regardless of when the duty to report child abuse came into being or how it was created, that the failure to report child abuse, by one whose profession is to manage responses to abuse, is malpractice. We therefore find that the occurrence took place in the context of the practice of social work, and so was covered by the policy.

Great American asserts that language in the policy excluding coverage for acts of sexual abuse by persons under the control of the insured, or the failure to report such acts, bars coverage. It argues that this language bars not merely coverage for child abuse committed by persons controlled by the insured (i.e., DARES) or for their failure to report such abuse, but also excludes coverage for defendants/counter plaintiffs' alleged negligence in handling the reports of abuse of the minor victims by third persons. We disagree.

Great American correctly notes that such coverage cannot be found simply because it is within the "reasonable expectations" of the insured that such coverage be provided. As our Supreme Court ruled in *Wilkie v Auto-Owners Ins Co*, 469 Mich 41, 51-63; 664 NW2d 776 (2003), the appropriate question is not what the parties might reasonably have expected, but what their contract provides. In resolving this question, we find it unnecessary to resort to traditional rules about insurance policies being strictly construed in favor of the insured, because a sufficient basis for resolving this question is provided by the dictate of *Wilkie* to consider the policy language. The plain language of the policy excludes coverage only for sexual abuse by persons whom the insured controls, or for the failure to report abuse by persons controlled by the insured, not coverage for malpractice in providing services to clients seeking the insured's assistance in dealing with abuse by persons outside the insured's control.

Great American next argues that the trial court erred in not finding that coverage was excluded by the policy's criminal and fraudulent acts exclusion. We disagree. The trial court found that there was insufficient evidence to conclude that defendants/counter plaintiffs committed any criminal or fraudulent acts. In considering whether a policy exclusion for criminal or fraudulent conduct bars coverage, the relevant inquiry for a court is whether such conduct occurred, not whether it was alleged. See *Shuler v Michigan Physicians Mut Liability Co*, 260 Mich App 492; 679 NW2d 106 (2004); *Auto Club Group Ins Co v Daniel*, 254 Mich App 1, 4; 658 NW2d 193 (2002). We review the trial court's factual findings in a declaratory

judgment action for clear error. *De Bruyn Produce Co v Romero*, 202 Mich App 92, 98; 508 NW2d 150 (1993). We do not find clear error in the trial court's finding that there was insufficient evidence to conclude that defendants/counter plaintiffs committed a crime.

Finally, Great American argues that *Cook v Auto Club Ins Ass'n (On Remand)*, 217 Mich App 414, 417-418; 552 NW2d 661 (1996), bars the court's consideration of the fact that no prosecution was brought, and that no convictions were procured. That is not what *Cook* holds. The case, noting that evidence of a conviction is proper in a suit by an insurer to preclude coverage, holds that it is inadmissible in a coverage suit brought *by an insured* against an insurer. It does not address the question whether it is admissible in a suit brought *by an insurer*. *Cook* is therefore not on point in this case which falls between the two other situations the case treats. In any event, it certainly was proper for the trial court to consider lack of evidence of criminal conduct. Put simply, Great American failed to carry its burden of proof as plaintiff on the applicability of the exclusion, and so the trial court properly ruled against it.

Affirmed.

/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald
/s/ Patrick M. Meter